period May 1994 through May 1996 was not pleaded in plaintiff's complaint; nor did plaintiff at any time seek leave of this court to amend its pleadings to incorporate such a claim.[1] That claim, referred to in writing for the first time in plaintiff's objections to the proposed form of final order, is simply not here, and may be prosecuted by plaintiff in a separate judicial or administrative proceeding.[2]

II

Counts one through five of Beehive's amended counterclaim raise a variety of issues respecting the FCC tariff noted above. The Court finds that, because these counts of the amended counterclaim raise technical issues of federal communications law, any decisions respecting these issues should be made by the FCC which has the expertise and experience needed to make them. Accordingly, these claims should be dismissed without prejudice to their assertion in a proceeding conducted before that agency.

Count six of the amended counterclaim raises a matter of tariff interpretation which is non-technical in nature, involving questions of notice and review prior to action taken under the aegis of the tariff. Count seven raises an issue of procedural due process under the Fifth

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[1] Counsel for DSMI commented at the April 21, 1997 hearing that "if Beehive was a RespOrg at the time of these number disconnections and was entitled to have those numbers on that basis, then it would still owe DSMI about $180,000 in unpaid charges under the tariff, because it didn't pay anything from April of '94 to May of '96." Transcript of Hearing, dated April 21, 1997, at 4:20-25 (Mr. Jensen). Nothing was done thereafter, however, to add any such claim by formal amendment of DSMI's complaint.

[2] Plaintiff's written objections filed June 15, 1998 assert that "[t]he conclusion that Beehive has fully paid amounts owing to DSMI is not supported by any evidence." Objection to Proposed Order and Judgment, filed June 15, 1998 (dkt. no. 69), at 2 ¶5. Yet counsel acknowledged in open court that the $48,879.95 sought in DSMI's complaint had been paid—a representation reaffirmed at the July 8 hearing on DSMI's objections. *See* Transcript of Hearing, dated July 8, 1998, at 3:8-17. Counsel for Beehive points to Exhibit 5 and testimony at page 25 of the June 13, 1996 preliminary injunction hearing transcript, as well as subsequent affidavits, including one by Mr. Wayne McCulley, filed September 27, 1996 (dkt. no. 35), as evidence of Beehive's payment of the amount claimed in DSMI's complaint. Thus it appears to be without substantial dispute that the $48,879.95 prayed for in the complaint was paid by Beehive and accepted by DSMI.

Amendment to the United States Constitution.[3] The gist of these counts of the amended counterclaim is that the plaintiff disconnected certain toll-free telephone numbers previously allocated to Beehive without giving notice and without permitting a fair review of the matter in controversy before the disconnection occurred. As noted above, however, the asserted basis for the disconnection—nonpayment by Beehive—has been vitiated by Beehive's subsequent tender of the amount claimed to be due and the acceptance of same by the plaintiff. Beehive in effect has redeemed the telephone numbers by curing the default, *i.e.*, non-payment of the tariff charges, which led to disconnection in the first instance. For all of these reasons, the Court finds that it is proper and just for the plaintiff DSMI to restore to defendant Beehive the use of all of those telephone numbers earlier allocated to Beehive,[4] at least pending further action before the FCC, and that the Court need not decide the notice and review questions raised by Beehive's sixth claim.

III

Plaintiff DSMI objected to Beehive's proposed form of final order on the grounds, *inter alia*, that Beehive is not entitled to judgment on its amended counterclaim because it never moved for judgment and "DSMI has had no opportunity to conduct discovery or to present evidence relative to the Amended Counterclaim" and that DSMI had inadequate notice of the Court's intention to dispose of the balance of the proceeding following the granting of

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[3] Remembering that the Due Process Clause addresses governmental rather than private conduct, the *governmental* action at issue under count VII remains unclear.

[4] At an earlier hearing in this proceeding, the Court ordered DSMI to restore use of certain of these numbers to Beehive. It is the understanding of the Court, after a colloquy with counsel for the parties, that this earlier order has been complied with by DSMI.

Beehive's motion for preliminary injunction. DSMI further objected that its complaint should not be dismissed without an adjudication of its claims for interest and costs.

Fed. R. Civ. P. 16 empowers a federal district court to expedite the disposition of any civil action and address the formulation and simplification of the issues "[a]t any conference under this rule," which this court construes to mean any pretrial status and scheduling conference, not merely the hearing calendared as a "Final Pretrial Conference." The relief sought by plaintiff DSMI in its complaint was simple, straightforward, and was in fact obtained by DSMI from Beehive without court intervention.

That being so, the question necessarily arises: what remains in controversy? Upon inquiry, it appeared that nothing remained in controversy concerning the plaintiff's complaint. At that point, Beehive's amended counterclaim remained pending, but the court was persuaded that the issues raised in that pleading which had not already been determined by events (the payment of money owed under the tariff) were best raised before the administrative agency having primary authority and expertise in the field of toll-free telephone numbers—the Federal Communications Commission. DSMI had urged as much in its motion to dismiss Beehive's counterclaim, previously argued, and the court remains persuaded that this view is well taken.

Counsel for DSMI complains of a lack of opportunity to conduct discovery or present evidence concerning Beehive's amended counterclaim, but neither it writing or in open court has counsel made any proffer concerning those facts or issues counsel believes require discovery or presentation of proof in this court, in contrast to the FCC. This court has not adjudicated the claims raised in Beehive's counterclaim beyond attempting to restore the status quo *ca.* May 29, 1996, when DSMI began to disconnect toll-free numbers allocated to Beehive

because of non-payment under the tariff. The rationale is simple: if a default in payment is cured, those rights of user in what is ostensibly a "public resource" which were interrupted for non-payment should be restored.

In this action, DSMI sought payment of amounts owing, and payment has been received. Whether Beehive is ultimately entitled to use of 56, or 120, or 2,000, or 10,000 toll-free telephone numbers seems to be a question better resolved elsewhere.

Being fully advised in the premises, the Court now rules as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Because the relief sought in the complaint has been obtained by the plaintiff, the complaint properly should be and hereby is DISMISSED WITH PREJUDICE.

2. Counts one through five of the amended counterclaim of the defendant are DISMISSED WITHOUT PREJUDICE so that either defendant or plaintiff may renew these aspects of the controversy between the parties before the FCC, if such renewal is desired by either of them.

3. Excepting the numbers which were embraced in the earlier directive of the Court, and which already have been restored to defendant Beehive, plaintiff DSMI forthwith shall restore all telephone numbers which are the subject of this proceeding to the defendant Beehive.[5]

4. Plaintiff's objections to the entry of a final order in this matter are OVERRULED. Within ten (10) days of the entry of this order, DSMI may file any application it wishes to

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[5] Plaintiff DSMI and defendant Beehive should cooperate with each other to the end that this restoration of numbers may occur as expeditiously as possible, so that the numbers may be put into service, becoming useable by defendant Beehive, as quickly as practicable.

make concerning any claim it asserts for interest on the $48,879.95 sought in its complaint.

Each party shall bear its own costs in this proceeding.

DATED this 13th day of July, 1998.

BY THE COURT:

BRUCE S. JENKINS
United States Senior District Judge

klh

United States District Court
for the
District of Utah
July 14, 1998

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:96-cv-00188

True and correct copies of the attached were mailed by the clerk to the following:

Mr. Floyd A Jensen, Esq.
RAY QUINNEY & NEBEKER
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PO BOX 45385
SALT LAKE CITY, UT 84145-0385
PFAX 9,5327543

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WASHINGTON, DC 20036

Alan Smith, Esq.
31 L ST #107
SALT LAKE CITY, UT 84103

[redacted]

Exhibit F

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DATABASE SERVICE MANAGEMENT, INC., a New Jersey Corporation,

Plaintiff-Counter-Defendant-Appellant,

v.

BEEHIVE TELEPHONE COMPANY, INC., a Utah Corporation,

Defendant-Counter-Claimant-Appellee.

No. 98-4117

ORDER

Filed January 6, 1999

Before **BRORBY**, **McWILLIAMS**, and **BRISCOE**, Circuit Judges.

Counsel for the appellant's letter to this court dated December 1, 1998 has been construed as a motion to clarify this court's order of November 24, 1998. The motion is granted.

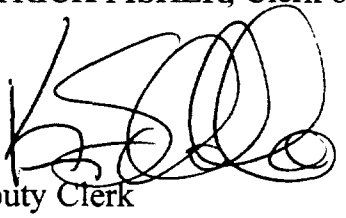
A change has been made in the last sentence on page 13 of the Order and the sentence now reads:

All "629" numbers of the 10,000 not currently in use by Beehive or other RespOrgs are to be placed by DSMI in "unavailable" status pending FCC resolution of the matters referred to it by the district court, provided, however, that Beehive shall be allowed to obtain a "629" number form the "unavailable" block when necessary to provide service to a new Beehive customer or additional service to an existing Beehive customer.

A revised order is attached. A copy of this order shall act as a supplement to the mandate issued originally on November 24, 1998.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: 
Deputy Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DATABASE SERVICE MANAGEMENT, INC., a New Jersey Corporation, Plaintiff-Counter-Defendant-Appellant, v. BEEHIVE TELEPHONE COMPANY, INC., a Utah Corporation, Defendant-Counter-Claimant-Appellee.	No. 98-4117 (D.C. No. 96-CV-0188-J) (D. Utah)

REVISED ORDER
Entered November 24, 1998

Before **BRORBY**, **McWILLIAMS**, and **BRISCOE**, Circuit Judges.

This matter is before the court on motions by Plaintiff/Appellant Database Service Management Incorporated (DSMI) to (1) remand this case to the district court with directions to refer the case to the Federal Communications Commission (FCC) under the doctrine of primary jurisdiction, (2) stay its appeal of the district court's order pending FCC disposition, and (3) suspend the district court's injunction pending FCC disposition.

Background

DSMI (a subsidiary of Bellcore) was incorporated in 1993 to administer the SMS/800 tariff and database. "SMS/800" is a computer service management system that manages the assignment and use of toll free numbers. The tariff for the system is designated SMS/800 Tariff. SMS/800 replaced what was known as the "Interim 800 NXX Plan," which until 1993 was used by Bellcore to assign and regulate the distribution of toll free numbers.

Numbers under the SMS/800 system are portable, meaning a subscriber may change carriers while retaining the same toll free number. Pursuant to the SMS/800 Tariff, services are available only to "Responsible Organizations" (RespOrgs), which reserve toll free numbers from SMS/800 and assign them to subscribers. Every toll free number must be associated with an authorized RespOrg; if a subscriber's chosen RespOrg is denied SMS/800 service then the subscriber must choose a different RespOrg or a new one is assigned. It is the RespOrgs that are required to pay applicable tariff charges for SMS/800 services.

In 1989, Beehive sought and received from Bellcore assignment of 10,000 toll free numbers with the prefix "629."[1] Beehive obtained these numbers under

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[1] Beehive sought the "629" prefix because it corresponds to the letters MAX on the telephone keypad. When we refer to "the numbers" throughout this order, we refer specifically to the 629 numbers.

the Interim Plan, the guidelines of which stated: "The NXX(s) is not permanently allocated to an exchange or interexchange carrier[], and no proprietary right is implied or intended with respect to the allocated NXX(s)." When SMS/800 became effective several years later, Beehive was granted RespOrg status. On April 26, 1994, DSMI revoked Beehive's RespOrg status and suspended its SMS/800 service after Beehive failed to timely pay service and late payment charges for SMS/800 services. DSMI then requested that Beehive direct its customers to select a new RespOrg. After Beehive failed to do so, DSMI began disconnecting the numbers at issue.

On March 1, 1996, DSMI filed an action in federal district court in Utah to collect Beehive's unpaid charges. On June 5, while Beehive's earlier motion to dismiss was still pending, Beehive tendered payment of the tariff charges sought by DSMI. On June 6, Beehive filed its answer and counterclaim, asserting in its counterclaim as follows: (Count 1) DSMI violated 47 U.S.C. §§ 201(a) & (b), 202(a), and 251(c) by refusing to negotiate with Beehive for management of toll free services; (Count 2) DSMI was ineligible to administer 800 numbers because it was not an impartial entity as required by 47 U.S.C. § 251(e); (Count 3) the SMS/800 Tariff is unlawful and invalid because not all RespOrgs are

telecommunications carriers as required by 47 U.S.C. § 251(e)(2)[2]; (Count 4) DSMI wrongfully refused to restore Beehive's RespOrg status and resume servicing Beehive, and wrongfully disconnected and continued to wrongfully disconnect the toll free numbers previously assigned to Beehive; and (Count 5) DSMI could not regulate 800 number administration because it admitted in a pleading it was not a common carrier.

On June 7, Beehive moved for a temporary restraining order and preliminary injunction, seeking reassignment of its previously disconnected numbers, restoration of its RespOrg status, and compulsory negotiations for further services. On June 10, at the hearing on Beehive's motion for temporary restraining order, the court ordered the parties to preserve the status quo pending the preliminary injunction hearing scheduled for June 13. At the June 13 hearing, the court ordered DSMI to reconnect fifty-six additional numbers and "to do nothing with the remaining portion of the 10,000 numbers." DSMI appealed, assuming the district court's ruling was the equivalent of an appealable

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[2] This counterclaim is one of at least two attacks Beehive has recently leveled against the SMS/800 Tariff. Beehive filed a complaint with the FCC against the Bell Operating Companies alleging the Tariff was unlawful. The FCC denied Beehive's complaint in 1995, see 10 F.C.C.R. 10562 (1995), and reaffirmed that denial in 1997, see 12 F.C.C.R. 17930 (1997). Beehive's appeal of the FCC rulings is now pending before the United States Court of Appeals for the D.C. Circuit.

preliminary injunction order. We dismissed the appeal for lack of a written order.

On January 9, 1997, Beehive requalified as a RespOrg. On February 7, 1997, it amended its counterclaim, realleging its previous claims and newly asserting in Count 6 that DSMI violated the SMS/800 Tariff by failing to reconnect Beehive to its previously assigned numbers, and in Count 7 that DSMI violated Beehive's Fifth Amendment due process rights by disconnecting the numbers in the first place without notice or hearing.

DSMI asked the district court to dismiss the Amended Counterclaim or to invoke the doctrine of primary jurisdiction and refer the matter to the FCC. In a July 13, 1998, order, the court dismissed with prejudice DSMI's complaint because Beehive had tendered the requested payments. DSMI does not appeal this ruling. The court also dismissed Counts 1 through 5 of Beehive's Amended Counterclaim, noting because these counts "raise technical issues of federal communications law, any decisions respecting these issues should be made by the FCC[,] which has the expertise and experience needed to make them." With respect to Counts 6 and 7, the court held:

> Count six of the amended counterclaim raises a matter of tariff interpretation which is non-technical in nature, involving questions of notice and review prior to action taken under the aegis of the tariff. Count seven raises an issue of procedural due process under the Fifth Amendment to the United States Constitution. The gist of these counts of the amended counterclaim is that the plaintiff disconnected certain toll-free telephone numbers previously allocated

> to Beehive without giving notice and without permitting a fair review of the matter in controversy before the disconnection occurred. As noted above, however, the asserted basis for the disconnection – nonpayment by Beehive – has been vitiated by Beehive's subsequent tender of the amount claimed to be due and acceptance of same by the plaintiff. Beehive in effect has redeemed the telephone numbers by curing the default, i.e., non-payment of the tariff charges, which led to disconnection in the first instance. For all of these reasons, the Court finds that it is proper and just for the plaintiff DSMI to restore to defendant Beehive the use of all of those telephone numbers earlier allocated to Beehive, at least pending further action before the FCC, and that the Court need not decide the notice and review questions raised by Beehive's sixth claim.

The court thus directed DSMI to "forthwith . . . restore all telephone numbers which are the subject of this proceeding to the defendant Beehive."

Three days after entry of this order, the district court entered a separate order directing DSMI to restore to Beehive certain "629" numbers and to

> hold the balance of the ["629"] numbers which it repossessed from Beehive until further order of this Court, provided, however, that if an existing subscriber to one of the Numbers asks for a transfer of that number in the ordinary course of business to a different RespOrg, DSMI may honor this request, consistent with the provisions of the SMS/800 Tariff. Otherwise, these numbers shall be frozen by DSMI so as to maintain the status quo in every respect.

DSMI appeals these orders[3] insofar as they direct it to reassign the numbers

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[3] These two orders can reasonably be read as inconsistent, with the first ordering the restoration of all the "629" numbers to Beehive, and the second ordering the restoration of certain numbers to Beehive, with the rest to remain in unavailable status. Both parties apparently read the orders as requiring the restoration of all the "629" numbers to Beehive.

to Beehive. DSMI contends the district court wrongfully assumed Beehive had a possessory right to reassignment of the "629" numbers upon the two-year late payment of its past-due tariff charges. At no time did the district court discuss whether Beehive, as alleged in Count 6, was entitled to the specific numbers under the SMS/800 Tariff. The court merely noted it was "proper and just" to require restoration of the numbers pending further review before the FCC. Nonetheless, the court did not refer the issues in Count 6 to the FCC, but required the forthwith restoration of the numbers to Beehive. DSMI now moves this court to remand the case with directions to refer the Count 6 issues to the FCC under the doctrine of primary jurisdiction. DSMI also asks the court to suspend the preliminary injunction and stay the instant appeal pending FCC resolution of these matters.

II. Analysis

A. Referral to the FCC

The doctrine of primary jurisdiction is a prudential common-law concept applied when resolution of a particular claim requires consideration of facts or issues deemed to be within the special competence of an administrative agency. In articulating and refining the doctrine, the Supreme Court has cautioned that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by

Congress for regulating the subject matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574 (1952). The doctrine is designed not only to encourage courts to defer to agency expertise when appropriate, but to "promote proper relationships between the courts and administrative agencies charged with particular regulatory duties." United States v. Western Pacific R.R. Co., 352 U.S. 59, 63 (1956). The doctrine of primary jurisdiction should be invoked if it would (1) "promote resort to agency experience and expertise where the court is presented with a question outside its conventional experience;" and (2) "ensure desirable uniformity in determinations of certain administrative questions." Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491, 1496 (10th Cir. 1996). We review under an abuse of discretion standard the district court's decision whether to apply the doctrine of primary jurisdiction and refer the case to the FCC. See Marshall v. El Paso Nat'l Gas Co., 874 F.2d 1373, 1377 (10th Cir. 1989).

Application of the primary jurisdiction doctrine is particularly warranted here. This case implicates significant issues of national importance regarding the rights and responsibilities of both DSMI and RespOrgs under the SMS/800 Tariff. These technical, substantive, and complex issues, which demand uniform resolution, are at least initially best left to the expertise of the FCC. See Allnet Communication Serv., Inc. v. National Exchange Carrier Ass'n, Inc., 965 F.2d

1118, 1120 (D.C. Cir. 1992) (noting it is "hardly surprising that courts have frequently invoked primary jurisdiction in cases involving tariff interpretations"). The district court ordered DSMI to reassign 10,000 "629" numbers to Beehive, while purportedly leaving the parties free to pursue further claims before the FCC. This restoration order appears contrary both to the well-settled national communications policy that carriers do not have a proprietary interest in any specific number or batch of numbers, see In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 F.C.C.R. 2910 (1987) (noting carriers do not "own" numbers), and to FCC regulations that prohibit any RespOrg from reserving more than 2,000 numbers at one time, see 47 C.F.R. § 52.109(a). Conflicting court-agency rulings are therefore likely. See Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1039 (10th Cir. 1993) (referring case to FCC where there was a "real possibility" of inconsistent FCC and district court decisions).

Beehive proffers two reasons for denying DSMI's referral motion. First, Beehive claims the appeal is moot because the district court in effect referred the matter by leaving the parties free to pursue further action before the FCC. This contention is based on the district court's statements in the July 13, 1998, order to the effect that Counts 1-5 raise "technical issues of federal communications law" that should be decided by the FCC, and the court's separate statement that

"[w]hether Beehive is ultimately entitled to use of 56, or 120, or 2,000, or 10,000 toll-free telephone numbers seems to be a question better resolved elsewhere." Pl.'s Ex. G, at 3, 6. The court, Beehive asserts, entered the preliminary injunction merely to preserve the status quo pending FCC resolution of the issues raised by the district court. The posture of this case, however, is different than that of the typical case referred by a district court to an agency under the doctrine of primary jurisdiction. Generally, in a referred case, there is an explicit order of referral and an order staying further district court action pending FCC resolution of the referred claims. There is neither here.

Furthermore, despite its assertion that the technical issues of Counts 1-5 were better resolved elsewhere, the district court created an incentive for Beehive not to present the matters in Counts 1-5 to the FCC. The district court's injunction effectively resolved the Counts 1-5 issues and assumed Beehive had a proprietary interest in the "629" numbers. In other words, the issues in Counts 1-5 may not be separated from the relief granted by the district court in Count 6. For this reason, we believe referral to the FCC of all issues in Counts 1-7 of Beehive's Amended Counterclaim is appropriate.

Beehive next claims we do not have jurisdiction to "summarily" invoke the doctrine of primary jurisdiction. This contention is patently without merit. As we noted recently in Williams Pipe Line, "because the doctrine of primary

jurisdiction exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the parties, we may examine whether it applies sua sponte." 76 F.3d at 1496 (internal quotations and citations omitted); see Mical Communications, 1 F.3d at 1038 ("Despite the fact that both parties have argued that there is no need to refer this matter to the FCC, we conclude that the district court should have stayed the matter pending the FCC's action on the . . . petition before it."). Thus, we have and now exercise the authority to remand the case to the district court with directions to stay proceedings pending referral of Beehive's Counts 1-7 to the FCC.

2. Stay of Appeal

DSMI seeks a stay of appeal pending referral to and resolution by the FCC. We think a stay of appeal is inappropriate in these circumstances and, therefore, will not retain jurisdiction over this matter pending FCC resolution. We believe the better course of action is to remand the entire case to the district court with directions to refer the matter to the FCC and to stay further proceedings in the district court pending an FCC resolution. Should either party want appellate review after the FCC and district court have acted, that option would still be available.

3. Suspension of injunction pending referral

In a separate motion, DSMI asks us to suspend the district court's injunction order pending referral to the FCC of Beehive's right to the numbers. Under DSMI's proposed suspension, all "629" numbers other than the approximately 300 numbers already available to Beehive will be placed in an unavailable status pending the appeal.

Federal Rule of Appellate Procedure 8(a) authorizes this court to entertain a motion for stay of injunction pending appeal. When submitting such a motion, the applicant is required to address four factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. See 10th Cir. R. 8.1.

To satisfy the "likelihood of success on appeal" factor, the applicant must first satisfy the other three factors and then demonstrate the appeal raises "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." McClendon v. City of Albuquerque, 79 F.3d 1014, 1020 (10th Cir. 1996). DSMI correctly asserts it is likely to succeed on appeal, as the district court's order appears contrary to established law. Nonetheless, the other three factors do not weigh in favor of plenary suspension of the injunction.

DSMI contends it will suffer irreparable injury if the injunction is not suspended because it will be forced to choose between complying with FCC regulations and complying with the district court's injunction order. FCC regulations prohibit RespOrgs from reserving more than 2,000 numbers at a time, holding any number in reserve status for more than forty-five days, and warehousing, hoarding, and selling toll-free numbers. The district court's injunction order contravenes these regulations by requiring DSMI to provide 10,000 "629" numbers to Beehive and permitting Beehive to hoard these numbers until this matter is resolved by the court or the agency, neither of which is likely to act within forty-five days.

We agree that the district court's injunction order is unnecessarily overbroad. However, this overbreadth is best remedied not by suspension of the injunction, but by narrowly tailoring the injunction to ensure that whatever potential proprietary interest Beehive may have in the numbers is preserved pending FCC referral and further judicial review. To avoid conflicting court/agency rulings, the district court's injunction is modified as follows: All "629" numbers of the 10,000 not currently in use by Beehive or other RespOrgs are to be placed by DSMI in "unavailable" status pending FCC resolution of the matters referred to it by the district court, provided, however, that Beehive shall be allowed to obtain a "629" number from the "unavailable" block when necessary

to provide service to a new Beehive customer or additional service to an existing Beehive customer. Additionally, any current holder of a "629" number shall, in accordance with the SMS/800 Tariff, be allowed to voluntarily transfer RespOrg status from Beehive to another RespOrg. This narrowly tailored injunction alleviates to the maximum extent possible any conceivable conflict between the district court's order and FCC regulations.

DSMI further argues suspension of the injunction would not injure Beehive because it survived for two years without access to most of the disputed "629" numbers. Admittedly, Beehive has not proffered any evidence that during this two-year period it lost any profits because of its inability to access the SMS/800 system to obtain for a paying customer a "629" number. It appears Beehive has never had more than a few hundred customers, and certainly never has been able to solicit enough customers to justify reservation of the full allotment of 10,000 "629" numbers. Thus, it is unlikely suspension of the injunction would result in grievous harm to Beehive, particularly in light of the injunction modifications discussed above. In the current circumstances, however, we are reluctant to fully entrust the numbers to DSMI. There is evidence in the record to indicate DSMI disregarded the district court's prior orders regarding preservation of the "629" numbers.

DSMI finally posits that suspension of the injunction is necessary to protect

the public interest. DSMI envisions the following chain of events: If the injunction is not suspended, the numbers will be released to Beehive. Beehive then will solicit end-user customers for the numbers. These end-users would incur expenses in using and advertising these numbers and, because Beehive now "owns" the numbers, would not be able to change RespOrgs. Furthermore, once DSMI prevails on appeal or secures a favorable FCC ruling, the numbers would have to be withdrawn from the end-users and made available to other RespOrgs on an equitable basis, as contemplated by the SMS/800 Tariff.

DSMI does not explain in convincing fashion why these customer's toll-free numbers would be disconnected. Even if we assume DSMI will prevail before this court or the FCC, we see no reason why Beehive's then-existing "629" customers would not be entitled to continue to seek service from Beehive, provided that Beehive, as it is currently, is then an approved RespOrg under the SMS/800 Tariff. Moreover, if the numbers are portable, logic dictates the end-users would at worst simply be required to select a new RespOrg.

In sum, the balance of factors does not weigh heavily in favor of suspending the injunction pending referral to the FCC. We instead believe the injunction should be narrowly tailored to the best interest of both parties. Therefore, the injunction is modified as follows: All "629" numbers of the 10,000 not currently in use by Beehive are to be placed by DSMI in "unavailable" status

pending FCC resolution of the matters referred to it by the district court; provided, however, that Beehive shall be allowed to obtain a "629" number from the "unavailable" block when necessary to provide service to a new Beehive customer or additional service to an existing Beehive customer. Additionally, any current holder of a "629" number shall, in accordance with the SMS/800 Tariff, be allowed to voluntarily transfer RespOrg status from Beehive to another RespOrg.

Conclusion

DSMI's motion to refer the case to FCC is GRANTED and the matter is REMANDED to refer Counts 1-7 of Beehive's amended counterclaim to the FCC under the doctrine of primary jurisdiction. DSMI's motion to suspend the district court's injunction is DENIED. On remand, the district court is directed to MODIFY its injunction as set forth in this order. DSMI's appeal is DISMISSED and its motion for stay of appeal is DENIED.

Entered for the Court

Clerk